

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Northwestern Corporation d/b/a Northwestern Energy and International Brotherhood of Electrical Workers, Local 44, Petitioner. Case 19–UC–261685

July 27, 2021

DECISION ON REVIEW AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

The issue presented in this case is whether the Regional Director properly clarified the existing unit of certain of the Employer’s employees to include those working in the newly created controller position at the centralized control facility in Butte, Montana.

On September 23, 2020, the Regional Director issued a Decision and Order Clarifying Unit, in which he granted the Petitioner’s petition requesting that the bargaining unit be clarified to include the controllers. In doing so, the Regional Director, applying the principles articulated in *Premcor, Inc.*, 333 NLRB 1365 (2001), found that because the controllers perform the “same basic functions” historically performed by unit employees, namely the Outage Management System (OMS) dispatchers, they should be included in the unit. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board’s Rules and Regulations, the Employer filed a timely request for review contending that the Regional Director erred in finding that the controllers perform the same basic functions historically performed by the OMS dispatchers. The Petitioner filed an opposition to the request.

On January 14, 2021, the Board granted the Employer’s request for review in part,¹ finding that it raised a substantial issue regarding whether the Regional Director correctly found that the employees in the newly created controller position perform the same basic functions as the employees in the OMS dispatcher bargaining unit position and that, accordingly, the unit needed to be clarified to

include the controller position. Thereafter, the Employer and the Petitioner filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, including the briefs on review, we find that the Regional Director erred in finding that the controllers perform the same basic functions as OMS dispatchers. We accordingly reverse the Regional Director’s clarification of the bargaining unit to include the controllers and we dismiss the petition.

Facts

The Employer is a utility company that provides electricity and natural gas to residential and business customers in Montana, South Dakota, and Nebraska. The Petitioner (International Brotherhood of Electrical Workers, Local 44) represents approximately 320 employees working in the Employer’s line operations, electric operations, and gas operations. The Employer and the Petitioner are parties to a collective-bargaining agreement that originally ran from May 1, 2016, through April 30, 2020, and—as of the date of the hearing—had been extended through April 30, 2021.²

In 2014, the Employer initiated plans to reorganize the Company and to create a centralized and automated control center in Montana. In order to do so, the Employer purchased InService software to serve as a transitional software program facilitating communications between its headquarters and field employees, as well as with customers. Additionally, the Employer created two new positions—mobile dispatcher and OMS dispatcher.³ The employees in the new positions were responsible for operating the temporary InService software; they were also generally tasked with recording and relaying power outage information provided by field employees to headquarters and then communicating any updates on outage repairs to the customer.

More specifically, the mobile dispatcher received information regarding power outages from the field employees (including technicians, engineers, and management), recorded that information in the InService software system and communicated any orders from headquarters to the

¹ The Board denied the Employer’s request in all other aspects, including the Regional Director’s finding that the controllers were not managerial employees.

² The collective-bargaining agreement’s recognition clause covers all employees performing work in the following classifications: all electrical classifications “covered hereby,” all gas classifications “engaged in gas service and installation work” at enumerated locations, and all craft classifications “historically covered in Generation facilities.” The agreement also contains articles recognizing the union as the exclusive bargaining agent of meter readers, warehouse and lead warehouse employees, and telecommunications techs employed at enumerated locations. Finally, the agreement contains an appendix setting forth each classification (and each classification’s wage rates) covered by the agreement. The appendix lists 143 classifications and sub-classifications in total.

³ The Employer’s job description for OMS dispatchers described the following duties:

The OMS dispatcher works in a Dispatching Center environment, responding to a variety of customer inquiries, system monitoring and mapping activities, as well as providing support and information for restoration efforts. The OMS dispatcher calls will be responsible [for] call monitoring with a priority goal of keeping accurate records, providing system status information, assisting in the safe restoration of service and customer satisfaction. The OMS dispatcher must work effectively within teams/work groups or with others to accomplish organizational goals. The OMS dispatcher must demonstrate strong adherence to accuracy, safe work practices/processes, customer service, and attendance.

The job description also required a high school diploma or equivalent (with advanced education preferred) and “[m]inimum 2 years’ [sic] experience in a high volume dispatching environment and/or the ability to work in a fast paced multi-tasking environment. Experience with mapping and basic electricity knowledge preferred.”

field staff. Thereafter, the OMS dispatcher was tasked with gathering information and updates from the field employees regarding steps taken to correct power outages and communicating such information to the customer. Based upon this information, other personnel, including field employees and upper-level management, would manually operate electrical switches, using “switch plans” to restore power outages.

At the time of implementation of the InService program in 2014, the Employer informed employees that the OMS dispatcher position would be temporary, as the Employer intended to replace the transitional InService software with an advanced distribution management system (ADMS). The Employer also announced that the ADMS would be operated by a new classification of employees—the controllers—and that this position would require additional skills, training, and responsibilities beyond those of the OMS dispatchers.

In 2017, an election was held in which the majority of the 16 employees working as mobile and OMS dispatchers voted to become part of the existing bargaining unit.⁴ On March 18, 2019, the Employer and the Petitioner reached a Memorandum of Understanding (MOU) that provided that all provisions of the existing collective-bargaining agreement would apply to the mobile and OMS dispatchers “except as outlined below.” The MOU went on to set forth two largely identical, but separate, articles outlining special conditions and provisions applicable to the mobile and OMS dispatchers.⁵

During the summer of 2019, the Employer began hiring for the controller positions⁶ as part of its transition process, consisting of four “phases,” to a fully automated ADMS. In phase one, the Employer hired eight controllers, four of whom were already working for the Employer as OMS dispatchers and four from outside the company. After hiring the controllers, however, the Employer experienced multiple delays in completing phase one of the transition process, which pushed back the implementation of the new ADMS software, which originally had a projected start date of September 2019. On October 13, 2019, the Employer informed the Petitioner that as a result of this delay (1) the four external individuals hired for the controller position temporarily would be assigned into

OMS-dispatcher positions, (2) the four OMS dispatchers hired to become controllers temporarily would keep their OMS-dispatcher positions, and (3) all eight individuals, along with all future individuals hired into controller positions, would be non-represented after the transition to ADMS software.

The Employer completed phase one of the transition process on January 30, 2020, at which time the ADMS software replaced the InService software. In a January 30, 2020 email to the Petitioner, the Employer explained that phase one had been completed and the eight employees hired to work as controllers therefore would begin “performing duties set forth in the [controller] job description.” The email explained further that, pursuant to the parties’ October agreement, these eight employees and all future employees hired into the controller position would be non-represented. Responding by email the same day, the Petitioner asked the Employer to confirm that the “OMS function” was not “being done by people” and that OMS duties had been “eliminated” by the new technology. The Employer responded “correct.” Thereafter, the classification of OMS dispatcher effectively ceased to exist.

The Employer’s transition plan provided for the full implementation of the ADMS system only with the completion of the planned fourth and final phase. As of the hearing, the Employer expected to complete that phase in late 2021 or early 2022. Upon full implementation of the ADMS system, all substation electrical switches in the field will be able to be operated remotely by the controllers, who will have centralized control of power restoration decision-making at the Butte facility. In the meantime, as of the time of the hearing, the majority of the controllers’ workday was dedicated to studying the Employer’s electrical systems (through six training modules) so that they would have the foundational knowledge required to make decisions about the restoration of power after the date of full ADMS operation.⁷

On June 15, 2020, the Petitioner filed a UC petition to clarify the existing bargaining unit to include the controller position.⁸

⁴ More precisely, the 2017 certification added “[a]ll full-time Mobile Workforce Management Dispatchers and Outage Management System Dispatchers employed by the Employer at its facility located in Butte, Montana; excluding all other employees, confidential employees, and guards and supervisors as defined by the Act” to the existing unit.

⁵ According to the Employer, the separate provisions for the OMS dispatchers were included due to the anticipated temporary nature of that position.

⁶ The Employer’s job description for the controllers described the following duties:

A Distribution Operations Control—Controller 1 will be responsible for managing and operating, through the use of software and an advanced control system, the utility distribution system across multiple regions of NorthWestern Energy’s service territory. The controller will

work in a control center environment, responding to utility system conditions, while working with and/or directing field resources.

The job description also required a “[m]inimum of associates degree in a technical discipline, similar technical/professional education, or minimum 2 years related experience in a similar control center environment.” While the associate degree or similar technical education is not described as an absolute requirement, employees were strongly encouraged to take additional technical courses before applying to the controller position.

⁷ Additionally, at the time of the hearing, controllers had emergency response duties—i.e., coordinating with servicemen and emergency services in the event that a field employee needed to dig electrical lines.

⁸ The Petitioner asserts that it did so only after former unit members notified it that the controllers were performing the same duties as OMS dispatchers.

The Regional Director's Decision

Applying *Premcor*, the Regional Director concluded that the controllers perform the same type of work as the former OMS dispatchers and should therefore be considered part of the existing bargaining unit. While acknowledging that the controller position—once fully realized—would have responsibilities exceeding OMS dispatchers, the Regional Director found that the “exact duties of the controllers even at that time remain not fully formed and speculative.” Instead, the Regional Director looked at the controller’s current duties and concluded that it was “undisputed” that the controllers are currently performing the “same work” as the work previously performed by OMS dispatchers.⁹ Finally, the Regional Director noted that the eight OMS dispatchers were replaced by an equal number of controllers and that those employees “continued to serve the same purpose with regard to the monitoring and reporting of outages,” so that allowing the controllers to remain in the unit would not change the existing unit. The Regional Director therefore clarified the existing unit to include the controllers.

Analysis

It is well established that unit clarification petitions are appropriate for “resolving ambiguities regarding the unit placement of individuals who come within newly-established classifications.” *Walt Disney Parks & Resorts U.S.*, 367 NLRB No. 80, slip op. at 3 (2019) (citing *Union Electric Co.*, 217 NLRB 666, 667 (1975)). The Board views a new classification as part of an existing bargaining unit where the new classification performs the “same basic functions” as unit employees. *Premcor*, 333 NLRB at 1367; see also *Developmental Disabilities Institute*, 334 NLRB 1166 (2001). The *Premcor* test accordingly requires the Board to compare the existing job classifications with the new job classification, including whether employees in both groups perform similar duties using similar processes and working conditions. *Premcor*, 333 NLRB at 1365–1366; *AT Wall*, 361 NLRB 695, 697–698 (2014). If those requirements are not met, the Board will find *Premcor* inapplicable.¹⁰

Contrary to the Regional Director, we find that the evidence does not demonstrate that controllers perform the

same basic functions as unit employees. As an initial matter, the unit at issue is defined by a list of specific classifications, so in order to be added to the unit, the controllers must be shown to perform the same basic functions as employees in a classification or classifications listed as within the unit.¹¹ See *Walt Disney*, supra, slip op. at 3 (citing *AT Wall*, 361 NLRB at 698).

The record reveals numerous fundamental differences between the OMS dispatcher and controller positions demonstrating that they do not perform the same basic functions. The OMS dispatcher position, as noted above, was largely a reporting role. The OMS dispatcher was tasked with gathering information and updates from the field employees regarding steps taken to correct power outages and communicating such information to the customer using the InService software. Aside from this reporting function, the majority of OMS dispatchers’ time (up to 60%) was spent “dispatching work to the resource” or mobile dispatching. All outage repair decisions (such as switch plans) were made either by repairmen in the field or by upper-level supervisors, in the case of major outages, not by the OMS dispatchers. No special training was required for this position; the only requirements were a high school diploma and 2 years of experience in a high-volume dispatching environment. Finally, the position was created to be a temporary position—i.e., from 2014 until the InService software was rendered obsolete by the implementation of the ADMS software (which occurred in January 2020).

In contrast, the controller position was created to be part of central operations, working towards the full integration of the new management system known as ADMS at the Employer’s centralized location in Butte, Montana. Those applying for the controller position were “encouraged” to complete a 2-year associate degree or to take related technical courses in order to understand the position’s increased technical demands. Through the application of the ADMS system (and accompanying software), the controller would have decision-making authority to resolve complex electrical outage issues.

Accordingly, as of the time of the hearing, the majority of the controllers’ day was dedicated to studying the Employer’s electrical systems (through six training modules)

⁹ To support this conclusion, the Regional Director relied exclusively on the testimony of witness Kelly Howery, who testified that her duties as a controller are “pretty much the same” as her former duties as an OMS dispatcher. But Howery also testified that, in her role as an OMS dispatcher, she performed mobile dispatcher duties 60% of the time and that she had no mobile dispatcher duties as a controller. The Regional Director minimized this distinction, finding that this 60/40 split (i.e., mobile dispatcher vs. OMS dispatcher) of duties only occurred “because there was a shortage of mobile dispatchers that caused the OMS dispatchers to fill in for them,” rather than as part of the normal OMS dispatcher job duties. We find that the Regional Director mischaracterized Howery’s testimony on this issue, as she clearly stated that the 60/40 split of duties occurred “the whole time” that employees served as OMS dispatcher.

¹⁰ If the *Premcor* test is not satisfied, the Board will add or “accrete” the new classification to the unit only if the employees sought to be added “have little or no separate identity and share an overwhelming community of interest” with preexisting unit employees. See *Walt Disney*, supra, slip op. at 3. Here, however, the Petitioner has not asserted that the controllers constitute an accretion to the existing unit; accordingly, we need not address the issue.

¹¹ As indicated above, the MOU the parties executed to extend coverage of the collective-bargaining agreement to the OMS and mobile dispatchers is explicitly classification-based, listing only these two classifications (and setting forth separate provisions applicable to each). Further, as also indicated, the collective-bargaining agreement itself is classification-based. See *AT Wall*, 361 NLRB at 697–698 (considering “restrictive,” classification-based description of the preexisting unit when excluding newly created positions from unit).

so that they would have the foundational knowledge required to make decisions about the restoration of power as the ADMS implementation process continues. Although, as of the hearing, the controllers were still using the ADMS software to perform duties that served the same basic function as duties that were historically performed by OMS dispatchers using the InService software, the controllers had been spending only about 40 percent of their worktime performing such duties. They had been spending the majority of their time preparing to assume new duties with a distinct function from any duties that had been historically performed by OMS dispatchers. That the controllers spent the greater part of their workdays receiving this training strongly supports finding that they were not serving the same basic functions as the OMS dispatchers, who did not spend any time studying the electrical systems in preparation for the implementation of the new ADMS system. Additionally, at the time of the hearing, controllers had emergency response duties—i.e., coordinating with servicemen and emergency services in the event that a field employee needed to dig electrical lines—that are not comparable to any OMS dispatcher duties.

Not only were there critical differences between the two positions as of the date of the hearing, but the Employer had taken concrete steps towards moving the controllers into a decision-making role with respect to the restoration of power outages. As of the time of the hearing, the Employer had only completed one of the four stages necessary for full ADMS implementation; however, the eventual completion of the four stages (by late 2021 or early 2022) was never in doubt. Upon completion of the four stages, controllers will monitor voltage and electrical flows and operate devices remotely in the field, using the ADMS system—decisions traditionally not made by OMS dispatchers. These decisions will include creating switching plans and directing certain work of other unit field employees with respect to certain outage responses. Although there was some imprecision as to controllers' ultimate duties, *Premcor* itself teaches that anticipated future duties are relevant to the “same basic functions” inquiry. See *Premcor*, above, at 1366 (considering that employees in new classification “will be responsible for maintaining continual communication with unit employees” in the future).¹²

Under these circumstances—two distinct job classifications, using different technology, receiving different training and with contrasting degrees of decision-making authority—we find that the controller position does not

perform the same basic functions as the OMS dispatcher position, despite some broad job similarities. See *Walt Disney*, above, slip op. at 2–3 (rejecting application of *Premcor* where newly created classification of drivers “drive different vehicles under different conditions, receive different training, and engage in different types of guest interaction” than existing unit of drivers); *AT Wall*, 362 NLRB at 697 (rejecting application of *Premcor* where newly classified employees used new equipment to produce different products, applied different processes and received different training).¹³ This is particularly true where, as here, inclusion of the controller in the existing unit would deprive those employees of the opportunity to exercise their free choice in the matter. In short, *Premcor* and its progeny do not support clarifying the unit to include controllers; we therefore reverse the Regional Director's decision.

ORDER

The Regional Director's Decision and Order Clarifying Unit is reversed and the petition is dismissed.

Dated, Washington, D.C. July 27, 2021

Marvin E. Kaplan,	Member
-------------------	--------

William J. Emanuel,	Member
---------------------	--------

John F. Ring,	Member
---------------	--------

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹² The Regional Director therefore incorrectly disregarded the undisputed future duties of controllers as “not fully formed and speculative.” Aside from the delays in the full implementation of ADMS, the record contains no evidence calling the controllers' ultimate duties into question. The cases upon which the Regional Director relied in focusing exclusively on present duties are distinguishable as they do not involve an application of *Premcor*. See *Hampton Roads Maritime Associates*, 178 NLRB 263 (1969); *Heckett Engineering Co.*, 117 NLRB 1395 (1957). Further, the Regional Director does not appear to have accounted for the

fact that controllers were spending the majority of their time preparing for their future duties and, therefore, spent only a minority of their time “doing the same work previously done by” the OMS dispatchers.

¹³ Similar to these cases, the Regional Director here engaged in an overly broad comparison of the controllers and OMS dispatchers in applying the “same basic purpose” test. See *Walt Disney*, supra, slip. op. at 3 (“As *AT Wall* teaches, the *Premcor* test does not compare employee functions at the broad level used by the Regional Director here”).